92-943

NO.

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER, TERM, 1992

CURTIS CAMPO, JR.
Plaintiff-Petitioner

vs.

ELECTRO-COAL TRANSFER CORPORATION INC.
Defendant-Respondent

SECOND PETITION FOR WRIT OF CERTIORARI TO REVIEW THE SECOND DECISION OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Has the Fifth Circuit in reaffirming the district Court's grant of a directed verdict ignored or misconstrued the mandate of this Court issued on January 13, 1992 vacating the Fifth Circuit's prior decision and remanding Campo for further consideration in light of *Southwest Marine, Inc. v. Gizoni* 112 S.Ct. 486?

Did this Court in vacating the Fifth Circuit's prior ruling in its entirety conclude from the facts recited by the Fifth Circuit from the record that there were indeed substantial issues of fact over which reasonable minds applying the proper legal standard could differ so that trial by jury and not directed verdict was the proper legal method of disposition?

Is petitioner, Curtis Campo, who was denied his right to trial by jury as a matter of law because he was engaged in one of the occupations listed in the Longshore and Harbor Workers' Act pursuant to *Pizzitolo v. Electro-Coal Transfer Corporation*, 812 F.2d 769 which was overruled by this Court in *Southwest Marine v. Gizoni*, 112 S.Ct. 486 *now* entitled to his right to trial by jury?

Did the Fifth Circuit have the discretion to ignore the mandate of the United States Supreme Court?

Did the Fifth Circuit on remand have the discretion to reweigh evidence which had never been presented to the jury so as to to affirm its prior correctness on factual findings and to apply conclusions never considered in its original opinion?

QUESTIONS PRESENTED FOR REVIEW (continued)

Must a claimant who is injured in the service of a specific vessel owned by his employer to which vessel he was assigned for the specific mission of the vessel to perform work which contributed to the mission of the vessel prove attachment to a fleet of vessels under this Court's rulings in *Desper v. Starved Rock*, 72 S.Ct. 807 and *McDermott International v. Wilander*, 111 S.Ct. 807?

Is the Fifth Circuit's relatively new time test of seaman status the *Robison-Barrett* rule (a combination of *Offshore Company v. Robison*, 266 F.2d 769, and *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067) in conflict with this Court's decisions in *Desper* and *Wilander* or was *Barrett* impliedly overruled by *Wilander?*

LIST OF PARTIES

The following are the parties to this proceeding:

Curtis Campo
Plaintiff-Petitioner

Electro-Coal Transfer Corporation
Defendant-Respondent

National Union Fire Insurance Company
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Intervenor

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

JURISDICTION 1

STATUTES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

REASONS WHY WRIT SHOULD BE GRANTED .. 13

ARGUMENT 15

CONCLUSION 25

PROOF OF SERVICE 29

APENDIX:

Appendix A
Opinion of the U.S. Fifth Circuit Court of Appeals in Campo II - *Campo vs. Electro Coal*, 970 F.2d 51 ..... A-1

TABLE OF CONTENTS (continued)

Page

Appendix B
Denial of Rehearing by the U.S. Fifth Circuit Court of Appeal A-6

Appendix C
Judgment of the Fifth Circuit Court of Appeal A-7

Appendix D
Stay of the Mandate to and including November 29, 1992 by Clerk, United States Court of Appeal, Fifth Circuit A-8

Appendix E
Writ granted by the United States Supreme Court on January 13, 1992 . . . . . A-10

Appendix F
Opinion of the United States Fifth Circuit Court of Appeal in Campo I 955 F.2d 210 . . . . . A-11

TABLE OF AUTHORITIES

CASES **Page**

Ardoin v. J. Ray McDermott, 641 F.2d 277 (5th Cir. 1988) 28

Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986) 10,14,23

Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) 8.11

Butler v. Whitman, 78 S.Ct. 734, 356 U.S. 281 26

Campo v. Electro-Coal, Transfer Corporation, Inc., 955 F.2d 210 (5th Cir. 1990) 1

Campo v. Electro-Coal, Transfer Corporation, Inc., ____F.2d____ (5th Cir. 1992) 1

Desper vs. Starved Rock Ferry, 342 U.S. 187, 72 S.Ct. 216 10,13,15,23

Gianfala v. Texas Company, 357 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1958) 26

Grimes v. Raymond Concrete, 356 U.S. 252, 78 S.Ct. 687 26

McDermott, Inc. v. Boudreaux, 679 F.2d 452 (5th Cir. 1982) 10

McDermott v. Wilander, 111 S. Ct. 807 11,13

Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747 (1944) 8

TABLE OF AUTHORITIES (continued)

CASES — Page

Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959) 10,14,21,25

Pizzitolo v. Electro-Coal, Transfer, 812 F.2d 977 (5th Cir.), cert. den. 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988) 3,10,19

Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 77 S.Ct. 415 27

South Chicago Coal & Dock Company v. Bassett, 104 F.2d 522 (7th Cir. 1939), 309 U.S. 251, 60 S.Ct. 544 (1940) 27

Southwest Marine, Inc. v. Gizoni, 112 S.Ct. 486 3,11

Statutes

28 U.S.C. 1254(1) 1

28 U.S.C. 2101(F) 1

46 U.S.C. 688(A) 2

DECISIONS BELOW

The opinions of the United States Court of Appeal, Fifth Circuit, are reported as follows:

Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (Campo II)

Campo v. Electro-Coal Transfer Corp., 955 F.2d 12 (Campo I)

and are reproduced in Appendix A and Appendix F.

JURISDICTION

This Petition seeks review of the second decision of the United States Court of Appeal, Fifth Circuit, entered in this matter on the 28th of August, 1992 on remand by this Court.

Petitioner thereafter petitioned the court for rehearing. On October 16, 1992, the Court of Appeal denied Petitioner's request for rehearing.

Petitioner obtained a stay of mandate pending application for writs to the United States Supreme Court. On the 30th day of October 1992, the Fifth Circuit granted a stay of mandate up to and including November 29, 1992.

This Petition is timely filed pursuant to 28 U.S.C. 2101(F). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES PRESENTED FOR REVIEW

Jones Act

Title 46, Section 688

Recovery for Injury to or Death of a Seaman

(a) Application of Railway Employees Statutes; Jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Pursuant to the provisions of the Jones Act 46 U.S.C. 688 (a), petitioner Curtis Campo filed a suit against his employer, Electro-Coal Transfer Corporation, for damages resulting from injuries sustained on February 22, 1986, while performing work in the service of a vessel, THE AUDREY PEARSON, a tug boat owned and operated by

Electro-Coal Transfer Corporation.

Electro-Coal defended on the basis that the Longshore and Harbor Workers' Compensation Act was Campo's exclusive remedy relying on the Fifth Circuit's ruling in *Pizzitolo v. Electro-Coal Transfer,* 812 F.2d 977 which has since been overruled by *Southwest Marine v. Gizoni,* 112 S.Ct. 468.

National Union Fire Insurance Company intervened to recover compensation paid Campo, pursuant to the Longshore and Harbor Workers' Compensation Act.

Campo was denied seaman status because he was engaged in an occupation enumerated in the Longshore and Harbor Workers' Act despite the fact that he loaded and unloaded vessels belonging to others as a member of the crew of an identifiable fleet of vessels owned by his employer, whose purpose and mission it was to facilitate the loading and unloading operations.

Electro-Coal operates a marine terminal which spans three miles on the Mississippi River, 40 miles south of New Orleans.

Annually six to seven thousand vessels engaged in commerce come to the terminal to be loaded, unloaded or transloaded. To load, unload and transload from one vessel to another, Electro-Coal maintains a fleet of vessels in constant navigation and commerce. Electro-Coal owns four harbor tugs used to move vessels, a floating work derrick and a general purpose cargo operating barge used to load and unload vessels and various shuttle barges and breasting barges used to position barges which are being loaded, unloaded, and transloaded.

In its terminal Electro-Coal also controls a fleet of vessels owned and operated by its sister companies to which it assigns Electro-Coal employees to maintain the welfare of this fleet while at anchorage.

Campo claims to be a member of the crew of the vessels owned and controlled by his employer to which he was more or less permanently assigned and to whose respective missions and welfare he contributed. He has never claimed to be a member of the crew of the vessels owned by Electro-Coal's customers.

Campo worked with the harbor tugs in moving the vessels of others; he worked with the special purpose vessels in loading and unloading the vessels of others and he tended to the maintenance, integrity and welfare of a fleet of vessels owned and controlled by Electro-Coal.

Campo was the sole crew member of the shuttle and breasting barges used in the barge haul assembly which he operated.

Campo like Gizoni was assigned to numerous vessels owned by his employer to service the vessels of others. Campo's daily assignments involved continuous service aboard a number of vessels owned by his employer.

Campo was assigned to each vessel for the particular task or mission and at different times worked aboard each and every one of the vessels in his employer's fleet.

Electro-Coal has two divisions of labor - the harbor boat division and the operations division.

The harbor boat division personnel perform the navigational functions of the vessels with motor power,

they move the tugs. The operations division personnel perform the specific duties relative to the accomplishment of the mission of the tugs as well as to all of the other vessels in the fleet.

The harbor boat division is composed of individuals specifically referred to as boat captains and deckhands who are permanently and continuously assigned to a designated harbor tug. One boat captain and one deckhand are assigned to each of the four tug boats continuously during a shift. They enjoy both the factual and legal permanency requirement of the Jones Act.

The other vessels in the fleet owned and controlled by Electro-Coal have no specific continuous crews aboard them. All, however, are manned by personnel from the operations department, all of whom enjoy legal permanency with the entire fleet though somewhat less permanency with each specific vessel. All also share the same hazards of the Mississippi River daily.

Petitioner's activities as a member of the operations division consisted of operating dockside equipment, as well as equipment aboard vessels. He was engaged in dock to vessel and vessel to dock loading and unloading as well as vessel to vessel transfers, both on the Mississippi River and in the Gulf of Mexico from vessels designed to transfer cargo mid-stream in the Mississippi and in the Gulf—clearly the work of a status seaman.

Petitioner's overall duties and responsibility included both maritime and non-maritime functions and navigational and non-navigational functions.

Petitioner boarded the Electro-Coal tugs to *assist* them in carrying out their function or mission of opening

and closing roll-top covers on barges, in positioning their barges for loading and unloading operations, in tying and untying their barges, in making and breaking their tows and in spotting river barges.

With regard to the barges which belonged to Electro-Coal's sister companies and which Electro-Coal controlled and to which petitioner was assigned to maintain their welfare, integrity and seaworthiness at anchorage, petitioner conducted general housekeeping duties aboard, tied and untied them, opened and closed their covers, pumped ballast, and maintained their hog and sag during loading.

Petitioner maintained hydraulic winches to which barges to be loaded and unloaded were attached in the barge haul assembly and controlled the breasting barge and the shuttle barge used in the barge haul assembly while unloading two barges simultaneously.

On February 22, 1986, petitioner was called in for overtime work.

To commence the day's work, roll-top covers on phosphate barges had to be opened. This was to be accomplished by the harbor tug whose mission it was to open the roll-top covers with a complement of two men assisting the Captain.

Petitioner first went aboard the tug to coordinate with the Captain and deckhand. He then positioned himself on the barge while his co-worker positioned himself on the tug. The two men then ran lines back and forth between the tug and the barge, each securing and unsecuring lines as needed as the barge covers were opened. It was during this operation in which petitioner was injured when the tug

struck the barge upon which petitioner was working knocking him into the hold of the barge.

At the conclusion of the testimony of status witnesses and before plaintiff had rested, the trial judge declared that he would entertain a motion for a directed verdict as reasonable minds could not differ that Campo was a longshoreman.

A directed verdict was granted, though plaintiff had not rested.

There was substantial evidence to let the matter go to the jury which had served for three days and could have decided the issue of status with but a simple instruction and time for deliberation.

The expediency of summary disposition outweighed considerations of economy and efficiency in the administration of justice.

DIRECTED VERDICT BY TRIAL COURT

The court refused to allow the matter to go to the jury despite the fact that the evidence disclosed an employer/employee relationship between Campo and Electro-Coal, that Electro-Coal owned the tug and controlled the barge, and that further on the evidence presented the following questions could be answered affirmatively:

1. Were the vessels upon which petitioner worked in navigation?

2. Did petitioner have a more or less permanent connection with an identifiable fleet of vessels owned and controlled by Electro-Coal?

3. Did petitioner contribute to the mission of said vessels and their well being at anchorage?

ON APPEAL THE FIFTH CIRCUIT AFFIRMED THE GRANT OF A DIRECTED VERDICT

The Fifth Circuit affirmed the District Court's grant of a directed verdict and held that Campo was foreclosed from seeking Jones Act seaman status, because he was covered under the Longshore and Harbor Workers' Compensation Act rendering the "member of a crew" exception to the Longshore and Harbor Workers' Act inoperative.

From the Fifth Circuit's citation and reference to *Boeing Co. v. Shipman*, 411 F.2d 365 and the Court's quotation from *Boeing* in support of its ruling, it must be assumed that the panel concluded that there was a mere scintilla of evidence and no substantial evidence or issue posing questions of fact for the jury.

In support of its legal conclusions and to demonstrate the lack of evidence, the panel recited facts from the record. The facts recited, however, demonstrated that substantial evidence over which reasonable minds could differ and different inferences drawn had been introduced.

The facts recited by the panel as to the navigable and non-navigable functions performed by Campo are similar if not identical to those stated by this Court in *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747 in support of its decision affirming that Rusin the decedent was a seaman.

The panel, in its opinion 955 Fd.2d at page 11, stated:

"The operations department personnel board tugs, barges and special-purpose vessels to position barges and to *'assist the harbor tugs' in opening and closing barge roll-top covers used to protect cargo in the barges.*"

"Campo's duties required that he conduct general housekeeping duties aboard the barges."

"Specifically, he had to tie and untie barges during the loading and unloading process, to open and close barge cargo covers, to keep barges clean, to insure that the barges did not take on water, to pump ballast, and to maintain hydraulic winches to which the river barges to be loaded and unloaded are attached.

In a 12 hour shift, Campo worked with as many as 20 barges and spent as much as 40 percent of the time tying and untying barges. *Campo also assisted harbor tugs in making and breaking tows, spotting river barges, and opening roll-top covers of barges.*"

The uncontroverted substantial facts recited by the panel establish that Campo was injured in the service of his employers' vessels in navigation to which he was more or less permanently assigned, and to whose missions he contributed and raised many questions of fact for the jury.

The facts recited by the panel were sufficient to support a finding of seaman status as a matter of fact and law.

The first Fifth Circuit decision was based on two conclusions of law:

1. Campo was not entitled to trial by jury (Pizzitolo)

2. There was a mere scintilla of evidence (Boeing)

There were no other factual or legal conclusions made.

EN BANC REHEARING REQUESTED BECAUSE OF INTRA CIRCUIT CONFLICTS AS WELL AS FIFTH CIRCUIT CONFLICTS WITH THE UNITED STATES SUPREME COURT

Petitioner next applied for rehearing en banc to the Fifth Circuit because of the conflict in the circuit which existed between *McDermott, Inc. v. Boudreaux*, 679 F.2d 452 decided by the Fifth Circuit in 1982 which held like *Gizoni* that a maritime worker whose occupation is one of those enumerated in the Longshore and Harbor Worker's Act may be a seaman within the meaning of the Jones Act and *Pizzitola v. Electro-Coal*, 812 F.2d 1977 decided by the Fifth Circuit in 1987 which held that coverage under the Longshore and Harbor Worker's Act precluded a finding of Jones Act seaman status.

Rehearing en banc was further requested because of the conflict between the Fifth Circuit's *Robison-Barrett* "time test rule of seaman status," (*Offshore Company v. Robison*, 266 F.2d 769 and *Barrett v. Chevron USA, Inc.*, 781 F.2d 1067) with the Supreme Court's "time test rule of seaman status" *Desper v. Starved Rock Ferry*, 342 U.S. 187 (reaffirmed in *Wilander*).

Rehearing en banc was denied despite the significant conflict within the Fifth Circuit itself as well as with the Fifth Circuit and prior decisions of the Supreme Court.

WRIT TO UNITED STATES SUPREME COURT GRANTED AND CAMPO VACATED

A first application for Writ of Certiorari was filed with this Court in November of 1990 prior to this Court's ruling in *McDermott v. Wilander* and *Southwest Marine v. Gizoni.*

This Court decided *Gizoni* on December 4, 1991 and thereafter granted a Writ on January 13, 1992 vacating Campo and remanding the case to the United States Court of Appeal for the Fifth Circuit for *consideration* in light of *Southwest Marine v. Gizoni.*

Since Campo was denied his right to trial by jury as a matter of law pursuant to *Pizzitolo* and since *Gizoni* reversed *Pizzitolo* it would appear that the only consideration for the Fifth Circuit was to apply the rule of law of *Gizoni* to Campo and remand the case to the district court for trial by jury.

IN THE FIFTH CIRCUIT ON REMAND THE FIFTH CIRCUIT AFFIRMS ITS PRIOR CORRECTNESS ON FACTUAL DETERMINATIONS BUT FOR DIFFERENT REASONS

On remand the Fifth Circuit reweighed the evidence and again denied Campo a right to trial by jury on several issues never addressed in its first opinion.

This time the Fifth Circuit determined;

(1) That *Boeing v. Shipman,* 411 F.2d 365 which this Court had rejected in vacating Campo originally was

applicable as if to overrule the Supreme Court to affirm its prior correctness.

(2) That factually Campo was not a member of an identifiable fleet of vessels. (A question of fact for the trier of fact.)

(3) That factually Campo was not a member of the crew of the six to seven thousand vessels which called at the terminal annually which was never an issue asserted by Campo. Had Campo asserted such, it would have been a question of fact for the trier of fact.

(4) That as a matter of fact and law Campo did not meet the *Robison/Barrett* "time test of seaman status of the Fifth Circuit." (A mixed question of facts and law-facts as yet determined by the trier of fact.)

SECOND APPLICATION FOR PANEL REHEARING DENIED

A second Application for Panel Rehearing was filed pointing out to the Court that issues decided by the Court or remand were issues upon which the jury solely should have been the factual arbiter.

Campo pointed out that the remand by the Supreme Court was to consider Campo in light of Gizoni not to reconsider Campo, upon further findings of fact and conclusions of law by the Appellate Court.

Campo pointed out that he claimed to be a member of the crew of the fleet of vessels found by the jury in *Pizzitolo* to constitute a fleet and recognized by the Fifth Circuit in *Pizzitolo* as a fleet of vessels owned by Electro-Coal.

Campo further pointed out that he had never claimed to be a member of the crew of the six to seven thousand vessels which called at the terminal and that such a finding by the Fifth Circuit was simply irrelevant, immaterial and gratuitous.

Further, it was pointed out that the Fifth Circuit Court's ruling in *Barrett* "the time or percentage test of seaman status" is in conflict with the rulings of this Court in *Desper v. Starved Rock Ferry* reaffirmed in *McDermott, Inc. v. Wilander.*

Rehearing was again denied.

Despite this Court's long awaited decisions in *Wilander* and *Gizoni* uiniformity will not be achieved in the administration of justice in the Fifth Circuit if the applicable standard of seaman's status under either the Longshore Act or the Jones Act continues to conflict with *Desper.*

Campo seems to be forever lost in the labyrinth of errors of law and fact in the Fifth Circuit and can't seem to get out. The writ granted previously by this Court was but a short lived ray of hope to an injured seaman who is approaching the seventh anniversary of his injury.

REASONS WHY WRIT SHOULD BE GRANTED

A writ of certiorari should be granted to review the second decision of the United States Fifth Circuit Court of Appeal rendered on remand from this Court on the grant of the first Writ application for the following reasons:

1. The Fifth Circuit has for a second time denied Campo a right to trial by jury by ignoring the provisions

of the Jones Act as well as the decisions of this Court which provide that seaman status under the Jones Act is a mixed question of law and facts and that factual issues are to be determined by the trier of fact not the Appellate Court.

2. The mandate of this Court to the Fifth Circuit to *consider* Campo in light of *Gizoni* was a mandate to remand Campo to the district court for a trial by jury and could not have been construed in any other manner since Campo had been denied seaman status as a matter of law and is now entitled to a right to trial by jury as a matter of law.

3. The Fifth Circuit in its second Campo opinion weighed the facts and affirmed its prior correctness but for different findings of *facts* and conclusions of law. Such action represents an extreme departure from the usual course of judicial proceedings in a Jones Act seaman status case and undermines the integrity of the judicial system as is evident from the fact that *Gizoni* will get his day in Court and Campo will not.

4. That this Court's rulings in *Wilander* and *Gizoni* are being interpreted differently in the Fifth and Ninth Circuits is evident from the fact that *Gizoni* and *Campo* both of whom were denied their respective right to a trial by jury summarily as a matter of law have not both had the right reinstated or restored. Gizoni is on his way to a trial by jury in the Ninth Circuit while Campo who has twice been denied his right is again petitioning this Court.

5. The Fifth Circuit's test of seaman status which was for years *Offshore v. Robison* and which this Court approved in *Wilander* no longer is the existing rule of seaman status in the Fifth Circuit nor has it been since the en banc consideration of *Barrett v. Chevron USA, Inc.* decided by the Fifth Circuit in 1986.

Since *Barrett* in 1986 the Fifth Circuit does not focus on an injured worker's status as a crew member on the basis of what he was doing at the time of injury but rather focuses on the status of the claimant on the basis of what he did in the past. The test is a "time test" or "percentage test" where an employee has mixed duties.

Barrett who was injured in the service of a vessel was found by the trier of fact to be a seaman at the time of injury. Barrett was affirmed by the Fifth Circuit but was denied seaman status on en banc rehearing on the basis of his past relevant work in that in the year preceeding his injury he had performed 70 to 80 percent of his work on platforms and no more than 20 to 30 percent of his work on vessels.

The Fifth Circuit's *Barrett* "time test of seaman status" is in conflict with *Desper v. Star Rock Ferry*, 342 U.S. 187, 72 S.Ct. 216 and *Wilander* (supra) which state that a man's status as a seaman must be determined by the activity in which he was engaged at the time of injury.

ARGUMENT

The mandate of this Court entered January 13, 1992 stated,

This Court today entered the following order in each of the above entitled cases:

The petition for a Writ of Certiorari is granted. The judgment is vacated and the case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Southwest Marine, Inc. v. Gizoni* 502 U.S. ____ (1991).

THE FIFTH CIRCUIT'S FIRST REASON FOR REJECTING CAMPO A SECOND TIME; IT AFFIRMED ITSELF ON GROUNDS DIFFERENT FROM THOSE OF THE PRIOR OPINION.

The Fifth Circuit declared in its second opinion that it considered Campo in light of *Gizoni* and affirmed its prior correctness on grounds different from those in its prior opinion.

The Fifth Circuit clearly exceeded the authority of the mandate which directed it to *consider* Campo in light of *Gizoni*, solely, and not reconsider in light of any other issues.

The mandate to the Fifth Circuit vacating its prior decision in its entirety and directing it to apply *Gizoni* could not have been interpreted to mean anything other than that Campo is entitled to a trial by jury.

The mandate was limited to the application of *Gizoni*. The Fifth Circuit was given no latitude to reconsider Campo in light of other factual issues never determined by the jury or other legal standards never considered in the first opinion.

The Fifth Circuit's first decision denied Campo his right to trial by jury as a matter of law on two principles of law, each of which was erroneously applied.

Both principles;

> first, that Campo was not entitled to a right to trial by jury as a matter of law (*Pizzitolo*)
>
> and

> secondly, that there was insufficient evidence to go to the jury (*Boeing*).

were rejected and vacated by the Supreme court.

The Fifth Circuit's position is legally untendable. There is no legal justification or authority for the Fifth Circuit to weigh the evidence nor to reverse the Supreme Court of the United States.

Once the two issues on which the Fifth Circuit decided the case originally were vacated there was nothing to reconsider.

The Fifth Circuit had but one of two options on remand;

> first, to confirm seaman status and remand to the district court on liability and damages;
>
> or
>
> secondly, to remand to the district court on status, liability and damages.

FOUR ISSUES DETERMINED BY THE FIFTH CIRCUIT ON REMAND ARE ADDITIONAL REASONS AS TO WHY A WRIT SHOULD BE GRANTED

The four reasons enunciated by the Fifth Circuit in its second opinion to justify the denial of a jury trial to Campo further exemplify why this Writ should be granted.

1. Under the Fifth Circuit standard for summary judgment and directed verdict *Boeing v. Shipman*

there was insufficient evidence to go to the jury.

2. Campo was not a member of the fleet of Electro-Coal's customers' vessels.

3. Campo was not a member of the crew of an identifiable fleet of vessels.

4. Campo did not comply with the *Robison/Barrett* test of seaman status in the Fifth Circuit.

ISSUE ONE

INSUFFICIENT EVIDENCE UNDER BOEING V. SHIPMAN

Since this Court rejected the application of *Boeing*, the Fifth Circuit's standard for granting summary judgment or directed verdict, in vacating the Fifth Circuit, how can the Fifth Circuit on remand maintain for a second time that there is insufficient evidence or a mere scintilla of evidence thereby reapplying *Boeing*? The Fifth Circuit may very well disagree with the Supreme Court but has no authority to reverse the Supreme Court which is what it appears it is attempting to do.

ISSUE TWO

THAT CAMPO WAS NOT A MEMBER OF THE CREW OF THE VESSELS OF ELECTRO-COAL'S CUSTOMERS

Campo never asserted such a claim. The Fifth Circuit's finding that Campo was not a member of the crew of the six to seven thousand vessels that called at the Electro-

Coal terminal is incomprehensible in light of the evidence, appellate brief and application for rehearing to the Fifth Circuit filed by Campo in which he described with specificity the fleet of vessels to which he was assigned and to which he claimed to be a member of the crew, as the Electro-Coal harbor tugs, special purpose vessels and barges.

Campo concedes, indeed stipulates, that he was not a member of the crew of the vessels of others. He made no such claim in his petition or in his pre-trial submissions nor did he attempt to prove such an issue. This finding goes beyond the scope of the pleadings and the evidence and is simply irrelevant, immaterial, gratuitous and non-meritorious.

ISSUE THREE

THAT CAMPO WAS NOT A MEMBER OF THE CREW OF AN IDENTIFIABLE FLEET OF VESSELS

1. CAMPO CLAIMED TO BE A MEMBER OF THE CREW OF THE VESSELS OWNED BY ELECTRO-COAL

The vessels which Campo described as a fleet are those vessels found by the jury and recognized by the Fifth Circuit in *Pizzitolo* to constitute a fleet. Quoting the Fifth Circuit in *Pizzitolo,* 812 F.2d 972:

> "Electro-Coal owns and operates four harbor tugs and a crane barge to load, unload and otherwise assist vessels calling at its terminal."

Campo and Pizzitolo were co-workers. The same marine terminal, the same employer, the same fleet of

of vessels and the same method of operating in the terminal were before the district court and the Fifth Circuit in each case.

In *Pizzitolo* the jury found the existence of a fleet, requisite permanent attachment and contribution to the mission of the vessel. The jury found Pizzitolo to be a seaman as a matter of fact and law.

Pizzitolo lost his Jones Act remedy as a matter of law by the Fifth Circuit's Pizzitolo rule which prevailed from 1987 to 1991 when this Court decided *Gizoni*.

Whether Campo was a member of the crew of the vessels upon which he worked and was injured is a question of fact for the trier of fact, and not for the Appellate Court whose function it is to apply the proper legal standards to the facts.

2. IS THERE A NECESSITY TO PROVE ATTACHMENT TO A FLEET OF VESSELS UNDER THE FACTS OF CAMPO?

The Fifth Circuit's third reason for rejecting Campo's seaman claim was stated to be that he was not permanently attached to a fleet of vessels.

Is there really a necessity to prove attachment to a fleet under the circumstances where one is specifically assigned to a specific vessel in navigation owned by his employer to do specific duties which further the mission of that vessel? Shouldn't Campo's status as a seaman be decided in relationship to the vessel in whose service he was injured and not to the fleet?

ISSUE FOUR

THE FIFTH CIRCUIT DENIED CAMPO HIS RIGHT TO TRIAL BY JURY BECAUSE HE DID NOT MEET THE ROBISON-BARRETT LEGAL STANDARD OF SEAMAN STATUS WHICH IS IN CONFLICT WITH THE SUPREME COURT'S STANDARD OF SEAMAN STATUS

The next ruling by which the Fifth Circuit denied Campo his right to a trial by jury was his failure to meet the *Robison-Barrett* "time test of seaman status."

The test of seaman status set forth in *Offshore v. Robison* 266 F.2d 769 and approved by this Court in *Wilander* is no longer the legal standard in the Fifth Circuit nor has it been since the en banc consideration of *Barrett.*

According to *Barrett* a claimant's job at the time of the injury is *irrelevant.* Where the claimant performs both maritime and non-maritime functions, the Fifth Circuit looks to the substantiality of the maritime work as opposed to the actual maritime work in which the person is injured.

This Court in *Desper* which was reaffirmed in *Wilander* stated that the inquiry into seaman status is of necessity facts specific; it will depend on the nature of the vessel and the employee's direct relationship to it.

Rather than defining seaman in terms of the employee's relationship or connection to a vessel at the time of injury the Fifth Circuit looks to the employee's connection to a vessel in his overall employment.

Barrett destroys uniformity in administering the elements of seaman status, because the inquiry is not whether the employee was a seaman at the time of injury but whether he has been a seaman in the past for a greater

portion of time during which he worked for the employer.

Besides addressing the specific issue in *Wilander* as to whether or not one had to aid in the navigation of a vessel in order to qualify as a seaman this Court went on to further affirm the rule of seaman status which had evolved from the decisional law of this Court.

Besides jettisoning the aid to navigation language in *Wilander,* this Court reiterated the legal standard by which status is determined.

SEAMAN UNDER THE JONES' ACT MEANS SEAMAN IN BEING AT THE TIME OF THE INJURY

Since the necessary prerequisite of seaman status is a relationship to a vessel in navigation, status must to achieve uniformity in application, be determined under the *Robison* rule.

Another issue which Campo will eventually have to face on remand in the district court is — **WHEN IS A SEAMAN A SEAMAN?** - according to *Robison* when he has a relationship to a vessel - according to *Barrett* when the time of the relationship to a vessel exceeds the time spent on non-maritime duties.

Does one become a seaman when he turns to and joins the vessel or is there some gestation period of seamanship or metamorphsis by which one who has mixed duties goes from non-seaman to seaman. Specifically, how is the status of a person who has mixed duties determined?

Campo was hurt in the service of a vessel belonging to his employer to whose mission he contributed. Because

of the *Robison-Barrett* legal standard in the Fifth Circuit he may on remand again be deprived of his right to trial by jury on errors of law.

For twenty-seven years Robison the bastion of seaman status under the Jones' Act, in the Fifth Circuit *Robison* remained inviolate until *Barrett vs. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986).

Barrett, who was a seaman in being under this Court's ruling in *Desper vs. Starved Rock*, 342 U.S. 187, 72 S.Ct. 216, and under the Fifth Circuit's *Robison* was found to be a seaman during his last eight days of employment with his employer by the trier of fact.

During his last eight days of employment, Barrett was assigned to a special purpose vessel.

Barrett was appealed and affirmed by a panel of the Fifth Circuit. Rehearing en banc was granted specifically to revisit *Robison*. The Fifth Circuit revisited *Robison* specifically to determine if it should redefine the rule of *Robison* which it did.

The *Robison-Barrett* legal standard now destroys and will continue to destroy the uniformity in the administration of the elements of seaman status which *Robison* alone had achieved.

The *Robison-Barrett* standard is in conflict with this Court's rule in *Desper vs. Starved Rock Ferry*, 342 U.S. 187, 72 S.Ct. 216 reaffirmed in *Wilander* and defeats seaman status and a right to trial by jury because it focuses on time spent on non-maritime duties as opposed to the relationship to a vessel in navigation at the time of injury.

Desper, who was a seasonal seaman, who worked aboard site seeing vessels during the season, was during the off-season a repairman on vessels which had been removed from navigation and which had been beached. Desper was injured during the off-season while doing repair work. Id 217.

This Court, in *Desper*, stated "*The fact that he had been or expected in the future to be a seaman does not render maritime, work which was not maritime in its nature.*" This Court stated that the question as to whether an individual is a seaman under the protection of the Jones' Act depends largely on the facts of the particular case, and the activity in which such an individual was engaged at the time of the injury. One must be a seaman in being at the time of injury to come under the protection of the Jones' Act. Id 217. A seaman in being can, however, be deprived of his right under Barrett.

While Barrett was a seaman in being at the time of his injury under Desper, he was denied seaman status, under the *Barrett-Robison* tests because during the year preceding his accident, he performed 70 to 80 percent of his work on platforms, and no more than 20 to 30 percent on vessels.

The Fifth Circuit, in its en banc consideration of *Barrett* modified *Robison* by focusing on past relevant work with the employer rather than relevant work at the time of the injury in the service of a vessel.

The En Banc Fifth Circuit Panel in reversing the finder of fact and the first panel stated that whether Barrett was a crew member should have been determined in the context of his employment as a welder's helper during a one year period of employment preceding the accident. Id 1074.

The En Banc panel consisted of the 13 judges of the Fifth Circuit, six of whom dissented. The dissesnt in Barrett authored by Judge Alvin B. Rubin stated:

> **"The majority refused to determine an injured worker's status as a crew member on the basis of what he was doing when he was injured, but insisted that his duties must be decided on the basis of what he did in the past and holds in effect that unless the worker's permanent job assignment has changed his duties and status at the time of the injury are irrelevant."**

This is the exact opposite of this Court's ruling in *Desper.*

CONCLUSION

It is respectfully submitted that a Writ of Ceritorari should issue for the following reasons:

1. The Fifth Circuit has ignored the mandate of this Court in reconsidering Campo in light of factual issues some of which were not even before the Court, none of which have ever been decided by a jury.

2. The factual issues determined by the Fifth Circuit were matters for the jury to decide and not the Appellate Court.

3. The law of the Fifth Circuit, the *Robison-Barrett* standard of determining seaman status is in conflict with the legal standard of seaman status of the United States Supreme Court *Wilander-Desper.*

WHETHER OR NOT A MARITIME WORKER IS A SEAMAN IS A QUESTION OF FACT FOR THE TRIER OF FACT

This Court has repeatedly stated that whether or not a maritime worker is a seaman is a question of fact for the trier of fact: *Senko v. LaCrosse Dredging Corp.*, 353 U.S. 370, 77 S.Ct. 544 (1940); *Gianfala v. Texas Company,* 357 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1958); *Butler v. Whitman,* 78 S.Ct. 734, 356 U.S. 281; *South Chicago Coal & Dock Company v. Basett,* 104 F.2d 522 (7th Cir. 1939), 309 U.S. 251, 60 S.Ct. 544 (1940); *Grimes v. Raymond Concrete,* 356 U.S. 252, 78 S.Ct. 687; *McDermott International v. Wilander,* 111 S.Ct. 807; *Southwest Marine v. Gizoni, 112 S.Ct. 486.*

WHO IS A SEAMAN MUST BE DECIDED BY THE LEGAL STANDARD OF THE UNITED STATES SUPREME COURT NOT THE FIFTH CIRCUIT

The Fifth Circuit affirmed the grant of a directed verdict in *Butler* and was reversed by this Court. The Fifth Circuit reversed a jury finding of seaman status in *Gianfala* and was again reversed by the Supreme Court.

The Fifth Circuit in its next seaman status case, *Offshore Company v. Robinson,* 266 F.2d 769 (5th Cir. 1959), made a complete analysis of the Gianfala per curium and arrived at the Fifth Circuit's test of status approved by this Court in *Wilander.*

Out of the Fifth Circuit's analysis of *Gianfala,* the test of seaman status in the Fifth Circuit was conceived.

There is evidentiary basis for a Jones Act claim to go to the jury:

1. If there is evidence that the injured worker was assigned permanently to a vessel, including a special purpose structure not usually employed as a means of transportation by water, but designed to float on water or perform a substantial part of his work on the vessel.

2. If the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission or to the operation and welfare of the vessel in terms of its maintenance during its movement or during anchorage for future trips.

In *Ardoin v. J. Ray McDermott* [691 F.2d 277 (5th Cir. 1981)], the Fifth Circuit interpreted the word "vessel" to mean "fleet of vessels."

The foregoing legal standard was approved and reaffirmed in *Wilander.*

If the *Barrett-Robison* rule of seaman status is not overruled the myriad of standards and lack of uniformity in administering the elements of seaman status in Jones Act claims which existed before *Wilander* and which *Wilander* and *Gizoni* had hopefully put to rest will begin a new.

Respectfully submitted,

LAW OFFICES OF
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BY:

Evangeline M. Vavrick

PROOF OF SERVICE

I, Evangeline M. Vavrick, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

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Attorneys for Intervenor

By mailing a copy thereof, postage prepaid addressed to their respective offices, this 27 day of November, 1992.

Evangeline M. Vavrick

APPENDIX A

Curtis CAMPO,
Plaintiff-Appellant,

v.

ELECTRO-COAL TRANSFER CORP.,
Defendant-Appellee.

No. 89-3738

United States Court of Appeals,
Fifth Circuit.

Aug. 28, 1992.

Worker injured while unrolling barge cargo cover at cargo transfer terminal brought claim under Jones Act. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., granted directed verdict for employer on issue of Jones Act seaman status. The Court of Appeals affirmed without opinion 909 F.2d 1480, and later issued opinion 955 F.2d 10, holding that worker was foreclosed from seeking Jones Act seaman status since worker was engaged in occupation expressly enumerated in Longshore and Harbor Workers' Compensation Act. Appeal was taken and the Supreme Court, 112 S.Ct. 858, vacated judgment. On remand, the Court of Appeals, Jerry E. Smith, Circuit Judge, held that worker was not assigned to a fleet of vessels, as needed to establish seaman status under Jones Act.

Affirmed.

On Remand from the Supreme Court of the United States.

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This court previously affirmed the district court's entry of a directed verdict against plaintiff Curtis Campo.[1] Our earlier opinion relied upon *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 983 (5th Cir.1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), the reasoning of which was rejected in *Southwest Marine v. Gizoni*, ___ U.S. ___, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991). The Supreme Court vacated our opinion in *Campo I*, directing us to reconsider in light of *Southwest Marine*. We do so now and affirm on grounds different from those in our prior opinion.

I.

Campo was employed by Electro-Coal Transfer Corp. (Electro-Coal) at its cargo transfer terminal on the Mississippi River. He was injured while unrolling a barge cargo cover[2] and brought suit against Electro-Coal under the Jones Act, 46 U.S.C.App. § 688.

After hearing Campo's evidence of his seaman status, the district court directed a verdict in favor of Elec-

---

[1] *Campo v. Electro-Coal Transfer Corp.*, 955 F.2d 10 (5th Cir.1990) (hereinafter *Campo I*) *vacated and remanded*, ___ U.S. ___, 112 S.Ct. 858, 116 L.Ed.2d 766 (1992).

[2] A detailed description of the facts of this case may be found in *Campo I*, 955 F.2d at 11-12.

tro-Coal. The court first held that no reasonable jury could find that Campo was a seaman, as he could not show a permanent assignment to or substantial work on a fleet of vessels. Relying upon *Pizzitolo*, the court also found that Campo was not a seaman as a matter of law because his job was specifically enumerated in the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(3). We affirmed on the basis of the court's second line of reasoning, finding that *Pizzitolo* controlled the outcome. *See Campo I*, 955 F.2d at 12.

II.

[1] *Southwest Marine* overruled *Pizzitolo*. *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1, 2 (5th Cir.1992). We therefore must examine that portion of the district court's ruling that did not rely upon *Pizzitolo*. On motions for directed verdict, we consider all of the evidence, not just that which supports the nonmovant's case, in the light and with all reasonable inferences most favorable to the nonmovant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc).

[2] In order to bring a claim under the Jones Act, Campo must show that (1) he was permanently asigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet and (2) that his work contributed to the mission of the vessel or fleet. *See Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir.1986) (en banc); *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir.1959).

[3] Whether the plaintiff relies upon establishing a permanent assignment or substantial work performance, he must show a connection to a vessel or fleet of vessels in order to satisfy the first prong of the *Robison/Barrett* test. *See Buras v. Commercial Testing & Eng'g Co.*, 736 F.2d

307, 310-311 (5th Cir.1984); *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir.1981)("[t]he key is that there must be a relationship between the claimant and... [an] identifiable group of vessels"), *cert. denied*, 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87 (1981). A fleet is "an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard." *Barrett*, 781 F.2d at 1074.

[4] Campo has failed to identify a group of vessels to which he was permanently assigned or on which he performed a substantial amount of work. Campo describes a six-or seven-thousand-vessel fleet composed of the small number of Electro-Coal vessels, river barges owned by Mid-South Towing, and ocean barges owned by Gulf Coast Transit.

[5] This grouping fails as a fleet for two reasons. First, Campo did not establish common control of these three groups of vessels.[3] Second, Campo was randomly assigned to vessels that entered the terminal, without regard to ownership, and not all of the vessels were owned or controlled by these three companies.[4] It is well established that a large number of variously owned and

---

[3] Counsel for Campo attempted to introduce a promotional film produced by Tampa Electric Company. Counsel never explained to the court that the purpose of this evidence was to prove common control of the vessels owned by Electro-Coal, Mid-South, and Gulf Coast. Nor would the promotional video, without more, have served to establish such common control.

[4] Campo seems to suggest that Electro-Coal controlled all the ships that used its terminal in that it directed the cargo operations. But "control" encompases more than a temporary authority to perform an isolated task on a vessel.

controlled vessels does not constitute a fleet. *See, e.g., Langston v. Schlumberger Offshore Servs.*, 809 F.2d 1192, 1194 (5th Cir.1987); *Barrett*, 736 F.2d at 1194; *Guidry*, 640 F.2d at 529.

Since Campo has not shown a relationship to a fleet of vessels, he does not qualify as a Jones Act seaman. The court properly granted a directed verdict in favor of Electro-Coal.

III.

Campo also has raised several evidentiary and procedural points of error. We reject these arguments for the reasons set out in the prior opinion. *See Campo I*, 955 F.2d at 12. The intervention of National Union Fire Insurance is dismissed as moot.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
OCT 16, 1992

No. 89-3738

CURTIS CAMPO,
Plaintiff-Appellant,

versus

ELECTRO-COAL TRANSFER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(October 16, 1992)

Before Politz, Chief Judge, Smith and Barksdale, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.
ENTERED FOR THE COURT:-

/s/ J. Smith
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
AUG 28, 1992

No. 89-3738

D.C. Docket No. CA 89 351G

CURTIS CAMPO,

Plaintiff-Appellant,

versus

ELECTRO-COAL TRANSFER CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

August 28, 1992

ISSUED AS MANDATE:

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Richard E. Windhorst, Jr.
Clerk

TEL. 504-589-6514
600 Camp Street
New Orleans, LA 70130

October 30, 1992

Ms. Evangeline Vavrick
Attorney at Law
912 Louisiana Avenue
New Orleans, LA 70115

No. 89-3738 - Curtis Campo -vs- Electro-Coal Transfer Corp.

MANDATE STAYED TO AND INCLUDING *NOVEMBER 29*, 1992

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should

not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this case.

Very truly yours,

RICHARD E. WINDHORST, JR.,
Clerk

By: /s/ Della J. Franklin
Deputy Clerk

Enclosures

cc: Ms. Kathleen K. Charvet
Mr. George R. Alvey, Jr.
Mr. Lance S. Ostendorf

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 13, 1992

Ms. Evangeline Vavrick
912 Louisiana Avenue
New Orleans, LA 70115

Re: Curtis Campo, Jr.
v. Electro-Coal Transfer Corporation, Inc.
No. 90-722
National Union Fire Insurance Company of Pittsburgh, Pennsylvania
v. Curtis Campo, Jr., et al.
No. 90-956

Dear Ms. Vavrick:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Southwest Marine, Inc. v. Gizoni, 502 U.S. -----(1991).

Very truly yours,

/s/ William K. Suter
WILLIAM K. SUTER, Clerk

APPENDIX F

Curtis CAMPO, Plaintiff-Appellant,

v.

ELECTRO-COAL TRANSFER CORPORATION, Defendant-Appellee.
No. 89-3738
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
July 23, 1990.

Appeal was taken from an order of the United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., which granted directed verdict for employer on issue of Jones Act seaman status. The Court of Appeals affirmed without opinion, 909 F.2d 1480, and subsequently issued opinion with Duhe', Circuit Judge, holding that because worker was engaged in occupation expressly enumerated in Longshore and Harbor Workers' Compensation Act, he was foreclosed from seeking Jones Act seaman status.

Affirmed.

Certiorari granted and judgment vacated, 112 S.Ct. 858.

Appeal from the United States District Court For the Eastern District of Louisiana.

Before WILLIAMS, SMITH and DUHE', Circuit Judges.

DUHE', Circuit Judge.

In this maritime personal injury suit Curtis Campo appeals the district court's grant of directed verdict on the issue of Jones Act seaman status. Finding that Campo is foreclosed from seeking Jones Act seaman status because he is covered under the Longshore and Harbor Workers' Compensation Act (the LHWCA), we affirm.

[1,2] On motions for directed verdict we consider all of the evidence, not just that which supports Campo's case, in the light and with all reasonable inferences most favorable to Campo. If the facts and inferences point so strongly and overwhelmingly in favor of Electro-Coal that reasonable men could not arrive at a contrary conclusion, the directed verdict was proper. However, if there is substantial evidence opposed to the motion, the motion for directed verdict should have been denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury; there must be a conflict in substantial evidence to create a jury question. *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969).

Campo was employed by Electro-Coal Transfer at its cargo transfer terminal on the Mississippi River. Electro-Coal employees are divided into two categories, the operations division and the harbor boat division. Employees of the harbor boat division are specifically assigned to one of Electro-Coal's four harbor tugs. The operations department personnel board tugs, barges, and special purpose vessels to position barges and to assist the harbor tugs in opening and closing barge roll-top covers used to protect

cargo in the barges. Generally, operations department employees are shoreside dock workers whose main function is to facilitate the loading and unloading of cargo.

Campo worked in the operations division as an operator/trainee and spent most of his time operating a continuous bucket unloader, a machine located on the dock and designed to remove cargo from barges. Campo's position required that he conduct general housekeeping duties aboard the barges. Specifically, he had to tie and untie barges during the loading and unloading process, to open and close barge cargo covers, to keep the barges clean, to ensure that the barges did not take on water, to pump ballast, and to maintain the hydraulic winches to which the river barges to be loaded and unloaded are attached. In a 12 hour shift Campo worked with as many as 20 barges and spent as much as 40 percent of the time tying and untying barges. Campo also assisted harbor tugs in making and breaking tows, spotting river barges, and opening roll-top covers of barges. In his eight years of employment with Electro-Coal, Campo substituted as a deckhand on a harbor vessel only twice. Beyond this, any activity performed by Campo while on any vessel was for the sole purpose of facilitating cargo operations.

[3] Campo was injured when he fell into a barge which was moored at the dock and being prepared to take on cargo. A tug was positioned on one side of the barge, and a line stretched between Campo and the tug was attached to the cover to roll it open. When the cover was opened Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, it either jostled the barge or Campo misstepped, causing Campo to fall into the barge's hold.

In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 982 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), we held that coverage under the LHWCA precluded a finding of Jones Act seaman status. *Williams v. Weber Management Services, Inc.*, 839 F.2d 1039, 1040 (5th Cir.1987). Section 902(3) of the LHWCA defines an "employee" covered under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker...." Campo's employment duties involved the loading and unloading of cargo, traditional long-shoring activities. *Durr v. Global Marine, Inc.*, 673 F.2d 740, 741 (5th Cir.1982). Because Campo was engaged in an occupation expressly enumerated in the LHWCA, the district court properly granted a directed verdict in favor of the defendant.

[4] We find Campo's remaining arguments unavailing. Campo first contends that the district court abused its descretion by holding the pre-trial conference on the Friday before jury selection began on Monday. However, Campo fails to point to any prejudice resulting from the timing of the pre-trial conference; in addition, if Campo were surprised by what transpired at the conference, his remedy was to have moved for a continuance. Having failed to do so, Campo waived the right to assert this alleged error on appeal.

[5] Campo also contends that the district court abused its discretion in condemning him to pay Electro-Coal's costs for duplicate copies of depositions of its employees taken by Campo. The law is clear that the court's order was proper because the copies were necessarily obtained for use in the case. *See West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co.*, 834 F.2d 1232, 1237-38 (5th Cir.1988). Campo's two final points, that the court erred in

excluding certain evidence and in limiting the consideration of Campo's employment duties to the two years directly prededing the accident, are rendered moot because the court considered all of the evidence before him in granting the directed verdict.

For the foregoing reasons, the judgment of the district court is in all respects

AFFIRMED.

Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

NOs. 92-943 & 92-1211

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CURTIS CAMPO, JR.
Plaintiff-Petitioner,

versus

ELECTRO-COAL TRANSFER CORPORATION, INC.
Defendant-Respondent

NATIONAL UNION FIRE INSURANCE COMPANY
Intervenor-Petitioner

versus

CURTIS CAMPO, JR., PLAINTIFF-PETITIONER, AND ELECTRO-COAL TRANSFER CORPORATION, INC.,
Defendant-Respondent

On Petitions for Writs of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

Respondent's Consolidated Brief in Opposition To Petitions for Certiorari

---

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QUESTIONS PRESENTED

Petition Nos. 92-943 and 92-1211 present identical questions arising from the same case:

I. Whether the questions presented by Petitioners merit review under Rule 10 of the Supreme Court of the United States.

II. Whether the Circuit Court of Appeals for the Fifth Circuit was correct in affirming the district court's directed verdict in favor of Respondent on the issue of Petitioner Campo's lack of seaman status for the purpose of asserting a remedy under the Jones Act, 46 U.S.C. § 688.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 4

I. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW 4

II. THE COURTS BELOW CORRECTLY APPLIED THE JONES ACT AND THE PRECEDENTS OF THIS COURT IN FINDING THAT CAMPO IS NOT A SEAMAN 6

A. THE QUESTION OF SEAMAN STATUS UNDER THE JONES ACT IS A MIXED QUESTION OF LAW AND FACT 8

B. BARRETT v. CHEVRON U.S.A., INC. WAS NOT OVERRULED BY THIS COURT 11

C. CAMPO'S RELIANCE ON PIZZOTOLO IS MISPLACED 11

CONCLUSION 12

CERTIFICATE OF SERVICE 13

APPENDIX: LISTING OF PARENT AND SUBSIDIARY COMPANIES IN ACCORDANCE WITH SUPREME COURT RULE 29.1 ..... A-1

TABLE OF AUTHORITIES

PAGE

CASES:

Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980) 9

Anderson v. Liberty Lobby Inc., 477 U.S. 243 (1986) 9, 10

Bach v. Trident Steamship Co., Inc., 920 F.2d 322 (5th Cir. 1991) 7, 8

Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986) 7, 11

Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) 10

Buras v. Commercial Testing & Engineering, Inc., 736 F.2d 307 (5th Cir. 1984) 6

Campo v. Electro-Coal Transfer Corp., 970 F.2d 54 (5th Cir. 1992) ..... passim

Galloway v. United States, 319 U.S. 372 (1943) 9

Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir. 1981) 6

Improvements Company v. Munson, 81 U.S. (14 Wall.) 442 (1872) 9

TABLE OF AUTHORITIES (cont'd)

PAGE

CASES:

Landry v. Hunthnance Drilling Company,
889 F.2d 1469 (5th Cir. 1989) 8

Langston v. Schlumberger Offshore Servs.,
809 F.2d 1192 (5th Cir. 1987) 6

Layne & Bowler Corp v. Western Well Works, Inc.,
261 U.S. 387 (1923) 5

Maryland Casualty Company v. Lawson,
94 F.2d 190 (5th Cir. 1938) 8

McDermott International, Inc. v. Wilander,
498 U.S. _____, 111 S.Ct. 807 (1991) ..... passim

Offshore Company v. Robison, 266 F.2d 769
(5th Cir. 1959) 4, 7, 11

Parklane Hosiery Company, Inc. v. Shore,
439 U.S. 322 (1979) 9

Pizzotolo v. Electro-Coal Transfer Corp.,
812 F.2d 977 (5th Cir. 1987), cert. denied,
484 U.S. 1059 (1988) 4, 11

Pullman-Standard v. Swint, 456 U.S. 273
(1982) 9

TABLE OF AUTHORITIES (cont'd)

PAGE

CASES:

Rice v. Sioux City Memorial Park Cemetery,
349 U.S. 70 (1955) 5

Southwest Marine, Inc. v. Gizoni, ____ U.S. ____,
112 S.Ct. 486 (1991) ..... passim

OTHER AUTHORITIES:

Jones Act, 46 U.S.C. § 688 ..... passim

Longshore & Harbor Workers' Compensation Act,
33 U.S.C. § 901 ..... passim

Rules of the Supreme Court of the
United States, Rule 10 ..... 4, 5

STATEMENT OF THE CASE

Curtis Campo, Jr., Petitioner, brought suit for personal injuries against his employer, Electro-Coal Transfer Corporation ("Electro-Coal"), under the Jones Act, 46 U.S.C. § 688, and the general maritime law. After hearing all of Campo's evidence on the issue of seaman status, the United States District Court for the Eastern District of Louisiana entered a directed verdict in favor of Electro-Coal. Construing all evidence in favor of Petitioner, the district court concluded that Petitioner was not a seaman under the Jones Act. This determination was affirmed by the United States Court of Appeals for the Fifth Circuit on grounds that Campo was not a seaman because he was not permanently assigned to a vessel or an identifiable fleet of vessels and because Campo was covered by the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. Appendix at A-11.[1] This Court subsequently vacated the first panel decision and remanded the case to the Fifth Circuit for reconsideration in light of Southwest Marine, Inc. v. Gizoni, _____ U.S. _____, 112 S.Ct. 486 (1991). Appendix at A-10. On remand the Fifth Circuit concluded that Campo was not a seaman under the Jones Act because he was not permanently assigned to a vessel or an identifiable fleet of vessels. Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1992); Appendix at A-1.

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[1] Petitioners in Nos. 92-943 and 92-1211 filed identical Appendices with the same pagination. The opinions of this Court and the Court of Appeals are reproduced therein. Citations are to Petitioners' Appendices at A-_____. Petitioner National Union Fire Insurance Company is the Longshore compensation insurer of Electro-Coal and filed an Intervention in the lower court.

The uncontested facts established that Campo was a shore-based terminal worker who assisted in loading and unloading bulk cargo at Electro-Coal's terminal in Plaquemines Parish, Louisiana. Electro-Coal's facility is used to transfer and store coal and other cargo. The terminal in question consists of shore-side buildings, a coal storage area, and a dock. Electro-Coal routinely transfers coal from vessel to vessel and between vessels and the shore-side storage area. Barges loaded with coal and other cargo to be discharged are routinely tied to the dock adjacent to the terminal. The cargo is then loaded either on to other barges or sea-going vessels, or stored in Electro-Coal's terminal. Cargo is loaded and unloaded by use of large electric-powered machines, various cranes, and a series of powered conveyor belts.

Electro-Coal's terminal workers are divided into two divisions, an operations division and a harbor boat division. Campo was assigned to the operations division and was classified as an operator trainee at the time of his accident. The operations division consists of shore-based dock workers who are involved with the handling, loading and unloading of cargo. Appendix at A-12-A-13. Campo's primary duties concerned the operation of the different types of equipment used in the cargo transfer process. This equipment is located on the dock and on land. To operate the machinery Campo would sit in the cab of a crane, above the dock, and pull various levers to move cargo on to conveyor belts or to allow the cargo to be let out of the machines into the barge.

The harbor boat division at Electro-Coal consists of a foreman, tug boat operators and deckhands who are permanently assigned to specific vessels. Campo was not assigned to this division. The harbor boat division runs and maintains Electro-Coal's four harbor boats. No evidence was presented suggesting

that Campo was permanently assigned to work aboard any of these vessels as a member of the crew. Appendix at A-4.

Like other marine terminals, thousands of barges and vessels call annually at the Electro-Coal facility to discharge or to load cargo. These cargo-carrying vessels, both river and ocean-going, are owned and operated by many different companies. None of the cargo-carrying vessels are owned by Electro-Coal, with the exception of a single barge, which is used for maintenance and clean up work.

In order to facilitate loading and unloading operations, Campo occasionally boarded barges, removed hatch covers, pumped ballast, and caught and released lines. Campo, however, admitted that these activities were for the sole purpose of facilitating the loading and unloading of cargo. Appendix at A-13. Campo spent most of his time operating a continuous bucket loader, a machine located on the dock and designed to remove cargo from barges. Appendix at A-13.

Campo was injured on a barge, moored at a dock, which he was temporarily aboard to prepare it to take on cargo. Appendix at A-13. A tug was positioned alongside the barge. A line from the tug was used to open a hatch cover on the barge. After the cover was opened, Campo detached the line and gave it back to the tug's deckhand. As the tug moved away from the barge upon which Campo was standing, Campo somehow fell into the barge's cargo hold. Appendix at A-13. There was no evidence or proof that Campo was permanently assigned to the tug, or any other vessel, as a crew member nor did Campo perform a substantial amount of his work on vessels. Appendix at A-4-A-5.

Campo brought suit against Electro-Coal under the Jones Act, contending that he was a "seaman." Electro-Coal defended contending, inter alia, that Campo, a shore-based terminal worker assisting in the loading and unloading of vessels, was not a Jones Act seaman, since he was not permanently assigned to any vessels or an identifiable fleet of vessels owned or controlled by Electro-Coal. The district court directed a verdict in favor of Electro-Coal at the close of Campo's case. This determination was affirmed by the Circuit Court of Appeals for the Fifth Circuit. Appendix at A-11. The U.S. Supreme Court vacated the first panel decision of the Fifth Circuit and remanded the case for reconsideration under this Court's decision in Southwest Marine, Inc. v. Gizoni, ____ U.S. ____, 112 S.Ct. 486 (1991) Appendix at A-10. On remand, the Fifth Circuit followed this Court's decisions in Gizoni and McDermott International, Inc. v. Wilander, 498 U.S. 337, 111 S.Ct. 807 (1991). The Fifth Circuit applied the test of seaman status articulated in Wilander and in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959), instead of relying upon Pizzotolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988), and concluded that Campo was not a seaman. Appendix at A-1; Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1992).

ARGUMENT

I. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW.

The questions raised by Petitioners do not merit review nor do Petitioners articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States

to support their argument that this Court should exercise its discretionary power of review. Rule 10 implies that there must be a substantial federal question presented to warrant the granting of certiorari. The questions presented by Petitioners relate solely to factual issues, and do not present substantial issues of law as required by Rule 10. The court of appeals' decision is not in conflict with a decision of this Court or of another federal circuit court of appeals, nor has the court of appeals decided a federal question in a way which conflicts with a state court of last resort. There is no evidence that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. In fact, as shown below, the decisions of the lower courts are in full accord with the Jones Act and the precedents of this Court.

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). No such reasons exist in this case. Petitioners are merely dissatisfied with the results below as it affects them as litigants and are attempting to re-argue the case which Petitioners lost below on undisputed facts. This Court has stressed that it does not "sit for the benefit of particular litigants." Rice, 349 U.S. at 74.

II. THE COURTS BELOW CORRECTLY APPLIED THE JONES ACT AND THE PRECEDENTS OF THIS COURT IN FINDING THAT CAMPO IS NOT A SEAMAN.

In Wilander, this Court emphasized that "The key to seaman status is employment-related connection to a vessel." 498 U.S. at _____, 111 S.Ct. at 817. The evidence establishes that Campo, a shore-based crane operator at a marine terminal, was not permanently assigned to a vessel or an identifiable fleet of vessels and therefore lacked seaman status. Following remand from this Court and oral argument by the parties, the Fifth Circuit concluded:

> Campo has failed to identify a group of vessels to which he was permanently assigned or on which he performed a substantial amount of work. Campo describes a six-or-seven-thousand-vessel fleet composed of the small number of Electro-Coal vessels, river barges owned by Mid-South Towing, and ocean barges owned by Gulf Coast Transit.
>
> This grouping fails as a fleet for two reasons. First, Campo did not establish common control of these three groups of vessels. Second, Campo was randomly assigned to vessels that entered the terminal, without regard to ownership, and not all of the vessels were owned or controlled by these three companies. It is well established that a large number of variously owned and controlled vessels does not constitute a fleet. See, e.g. Langston v. Schlumberger Offshore Servs., 809 F.2d 1192, 1194 (5th Cir. 1987); Buras, 736 F.2d at 310; Guidry, 640 F.2d at 529.

> Since Campo has not shown a relationship to a fleet of vessels, he does not qualify as a Jones Act seaman. The court properly granted a directed verdict in favor of Electro-Coal.

Appendix at A-4; Campo II, 970 F.2d at 52-53 (footnotes omitted).

Unlike Gizoni, Campo was given every opportunity at the district court level to demonstrate that he might be entitled to Jones Act coverage. After presenting all of his evidence in support of his claim for seaman status, Campo was unable to show a relationship to an identifiable fleet of vessels and the district court granted a directed verdict in favor of Electro-Coal. On reconsideration in light of Gizoni, the Fifth Circuit in Campo II affirmed the district court's holding that "[n]o reasonable jury could find that Campo was a seaman, as he could not show a permanent assignment to, or substantial work on, a fleet of vessels." Campo II, 970 F.2d at 52; Appendix at A-3. The Fifth Circuit correctly upheld the district court's application of Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959), and Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986), which require a party claiming seaman status to show:

1. He was permanently assigned to a vessel or performed a substantial part of his work on a vessel or an identifiable fleet of vessels; and

2. His work contributed to the mission of the vessel or fleet;

Barrett, 781 F.2d at 1074-76.

The case of Bach v. Trident Steamship Co., Inc., 920 F.2d 322 (5th Cir. 1991), supports the soundness of this conclusion by having emphasized: "A large body of law, developed through a case-by-case application of the Robison test, provides the means for deciding which workers are entitled to the benefits of the Jones Act. Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels." Bach, 920 F.2d at 326 (emphasis added). In Bach II, 947 F.2d 1290, the Fifth Circuit reinstated the Bach I opinion following remand from this Court.

In Wilander, this Court examined the soundness of the Robison test and found it to be the appropriate standard for determining Jones Act seaman status. This Court cited language from Maryland Casualty Company v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938), that "there is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise." 498 U.S. at ___, 111 S.Ct. at 817. Campo put forth no evidence from which a jury could infer that he was permanently assigned to a vessel or an identifiable fleet of vessels. The Fifth Circuit's upholding of the district court's granting of a directed verdict in favor of Electro-Coal is in accordance with this Court's decisions in Gizoni and Wilander. Campo does not qualify as a Jones Act seaman and the district court properly granted a directed verdict in favor of Electro-Coal.

A. THE QUESTION OF SEAMAN STATUS UNDER THE JONES ACT IS A MIXED QUESTION OF LAW AND FACT.

Petitioners incorrectly suggest that the question of seaman status always should be the exclusive province of the jury. Petitioners completely ignore the purpose of a directed

verdict. In Jones Act cases, "a mere scintilla" of evidence is insufficient to present a question for a jury and there must be a conflict in substantial evidence to create a jury question. A directed verdict is appropriate where there is a complete absence of probative facts supporting plaintiff's position. See, e.g., Landry v. Huthnance Drilling Company, 889 F.2d 1469, 1470 (5th Cir. 1989); Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980).

The right to a jury trial does not negate the authority of federal courts to direct a verdict or enter a judgment notwithstanding the verdict for insufficiency of evidence. Galloway v. United States, 319 U.S. 372, 389 (1943) (federal courts have power to direct verdict for insufficiency of evidence even though claimant has right to jury trial); Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 333-35 (1979)(offensive use of collateral estoppel does not violate defendant's right to trial by jury). Petitioners' arguments ignore this Court's recognition that it is proper to direct a verdict when, under the governing law, "there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986). In Anderson, this Court noted that judges are not "required to submit a question to the jury...unless the evidence is of such a character that it would warrant the jury finding a verdict in favor of that party." 477 U.S. at 251 (quoting Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)). Campo put forth no evidence from which a jury could have inferred that he was permanently assigned to a vessel or fleet of vessels.

In Wilander, this Court stated: "[w]e note that the question of who is a 'member of a crew,' and therefore who is a 'seaman,' is better characterized as a mixed question of law and fact. When the underlying facts are established and the rule of

law is undisputed, the issue is whether the facts meet the statutory standard. See Pullman-Standard v. Swint, 456 U.S. 273, 289, n.19, 102 S.Ct. 1781, 1790, n.19, 72 L.Ed.2d 66 (1982)(defining a mixed question)." Wilander, 498 U.S. at _____, 111 S.Ct. at 818.

This Court went on to note that "member of a crew" and "seaman" are statutory terms and therefore their interpretation would be a question of law. The Court specifically addressed the appropriateness of directed verdicts in Jones Act cases: "Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law would reasonably support only one conclusion." Wilander, 498 U.S. at ____, 111 S.Ct. at 818 (citing Anderson v. Liberty Lobby Inc., 477 U.S. 243, 248 (1986)). Accordingly, the Fifth Circuit did not err in upholding the district court's granting of a directed verdict on the question of seaman status.

Petitioners also suggest that the Supreme Court rejected the applicability of Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969). Campo gives no authority for this bold assertion that this Court rejected the application of Boeing. This argument is pure conjecture and is entirely unsupported by the case law and the record. The district court correctly applied the legal standard for granting a directed verdict, which is the standard of Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) because Campo failed to introduce substantial evidence over which reasonable minds could differ that he was not permanently assigned to an identifiable fleet of vessels.

B. BARRETT v. CHEVRON U.S.A., INC. WAS NOT OVERRULED BY THIS COURT.

Campo concludes that Wilander somehow impliedly overrules the Robison/Barrett test for determining seaman status. The Wilander decision is totally devoid of any language which can be construed to overrule Barrett. Wilander was essentially concerned with the second prong of the seaman status test "that the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission" and not with the first prong of the test which is the prong which was the subject matter of Barrett and this case.

Campo was not a Jones Act seaman because he could not establish a permanent connection to a vessel or an identifiable fleet of vessels. Therefore Campo could not satisfy the first prong of the Robison test, without regard to the Barrett decision's "time test." The "time test" of Barrett simply was not at issue and not relied upon by the lower courts in reaching their conclusions. The Fifth Circuit in Campo II concluded: "Whether the plaintiff relies upon establishing a permanent assignment or substantial work performance, he must show a connection to a vessel or fleet of vessels in order to satisfy the first prong of the Robison/Barrett test." Appendix at A-3; Campo II 970 F.2d at 52.

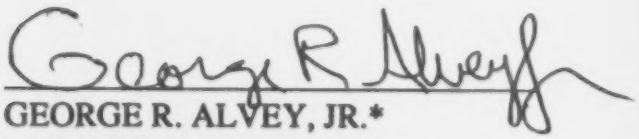
C. CAMPO'S RELIANCE ON PIZZOTOLO IS MISPLACED.

Campo attempts to go beyond the record before this Court to establish facts by relying on the case of Pizzotolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988). In Gizoni, this Court overruled Pizzotolo which was recognized by the Fifth Circuit in Campo II. Accordingly, any reliance on the facts set forth in Pizzotolo as an attempt to show Campo's assignment to a fleet of vessels is inappropriate and should not be before this Court.

CONCLUSION

The questions presented by the Petitioners do not merit review because, as a matter of law and fact, Campo was not a Jones Act seaman since he was not permanently assigned to a vessel or an identifiable fleet of vessels. The decisions of the lower courts correctly apply the Jones Act and the United States Court of Appeal for the Fifth Circuit correctly applied the precedents of this Court in Gizoni and Wilander. Accordingly, Petitioners' second petitions for writs of certiorari to review the second decision of the United States Court of Appeal for the Fifth Circuit should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel for all parties by placing same into the United States Mail or Hand Delivery on this the 28th day of January, 1993.

GEORGE R. ALVEY, JR.*

* Counsel of Record

APPENDIX A

APPENDIX: Listing of Parent and Subsidiary Companies in Accordance with Supreme Court Rule 29.1:

Electro-Coal Transfer Corporation
TECO Energy, Inc.